United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

76-4153

B

United States Court of Appeals
FOR THE SECOND CIRCUIT

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

against

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

Rehearing En Banc Pursuant to Order of February 15, 1977

REPLY BRIEF FOR PETITIONERS TOWN OF DURHAM AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY

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UNITED STATES COURT OF APPEALS
FILED
MAR 25 1977

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 76-4151, 76-4153

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent,

POWER AUTHORITY OF THE STATE OF NEW YORK, et ano.,

Intervenors.

REPLY BRIEF FOR PETITIONERS TOWN OF DURHAM AND ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY

The Commission's arguments directed against this Court's December 8, 1976 Majority Decision raise nothing new. We believe we have answered the Commission's points and sallies in our main brief in this en banc proceeding. Significantly, the Commission does not dispute the extensive data we have adduced concerning

the legislative history and statutory framework underpinning the Comptroller General's authority, as Congress' agent, to determine the propriety of expenditures by the Commission.

Part of the Commission's resistance to the Majority Decision is premised on its notion that the Comptroller General did not know what he was doing when he prepared his May 10, 1976 decision. The Comptroller, contrary to the Commission's suggestion (Br. p. 14), in fact "examined" the statutory and/or regulatory authority relating to the Commission and determined that the rationale of the February 19 NRC decision was "equally applicable" to the Commission. (Addendum B, pp. 1-2).

Another theme running through the Commission's position is its theory that Majority Decision would result in impermissible "fee-shifting" rather than "fee reimbursement." The Commission's contentions on this score are treated in our main brief (pp. 34-36). As we there noted, among other things, Alyeska concerned the far different context of fee shifting between private adversaries.

The Commission's proposition is that licensee payments under Section 10(e) of the Federal Power Act are administrative costs; hence, if a penny from these payments was authorized, in the Commission's discretion,

to impoverished intervenors to help defray the expenses of their participation -- this would be Alyeska fee-shifting and therefore barred. It is a specious argument. Intervenors in contested hydroelectric and transmission line proceedings participate in these proceedings today, with the Commission's blessings, without being confronted with the claim that since a licensee may be footing part of the additional administrative costs involved in the proceeding (perhaps as a result of the intervenors' participation), intervention by the public is improper.* Indeed, the Commission's own August 28, 1970 Order authorizing the furnishing of copies of transcripts to parties unable to purchase them, in hydroelectric proceedings, would seemingly be unlawful if the Commission followed the argument it has made in this en banc. (See Annex 1 hereto, p. 46).

The Commission's bobbing and weaving on the core issue in this en banc is perhaps best shown by its recent response to Senator Warren G. Magnuson, Chairman of the Senate Committee on Commerce. To this Court,

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* This Court has held that the "Federal Power Act gives petitioners [intervenors] a legal right to protect their special interests." Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608, 616 (2d Cir. 1965), cert. denied, 348 U.S. 941 (1966).

the Commission urges that the Comptroller General's decisions, insofar as they are applicable to the Commission, are a nullity. To the Congress, the Commission tells a different story.

On December 1, 1976, Senator Magnuson wrote the Commission advising it, inter alia, of the Comptroller General's May 10, 1976 decision. The Senator then advised and requested:

> "It would appear, therefore, that there is no longer any doubt that your agency already possesses ample legal authority to do what FDA, at Consumers Union's urging, is evidently preparing to do -- begin to remedy the advocacy imbalance which characterizes the regulatory decisionmaking processes of virtually all Federal agencies.
>
> "Accordingly, I request that you advise me within 30 days of what specific actions, if any, your agency is taking to insure that nonindustry groups which cannot afford the cost of full participation in your agency's regulatory proceedings are in fact enabled to do so. In the event that you have not taken such actions, I request that you advise me as to the reasons for such inaction." (Annex 1 hereto, pp. 1-2).

The Commission, through its Chairman, on December 23, grudgingly conceded the applicability of the Comptroller General's decisions. Chairman Dunham stated:

> "As you are no doubt aware, the Commission has not previously favored the payment of fees to participants in our proceedings. The Commission has opposed legislative proposals which would grant broad authority for such payments. Please refer to the attached FPC report on S. 2715.

> We note that any present authority to pay such fees, in the view of the Comptroller General, is much more limited than the authority which would have been conveyed by past legislative proposals." (Emphasis added).

The FPC's Chairman then set forth the tests established by the Comptroller General, and noted:

> "However, the Comptroller General emphasized that this determination is discretionary with each agency. To date, the Commission has not been faced with a request for fees in a case where the participant in a Commission proceeding met both of these criteria. The question as to whether the FPC will use the discretionary authority acknowledged by the Comptroller General must await the determination of the Commission in light of the particular circumstances of a future case." (Annex 1 hereto, p. 45) (Emphasis added).

Nowhere in the Commission's letter to the Congress did it contend, as it does to this Court, that payments to intervenors are barred by Alyeska or that the Comptroller General's rulings can be tossed aside.

The Federal Energy Administration ("FEA") recently acted on this issue consistent with Senator Magnuson's understanding "that there is no longer any doubt" that many public agencies, including the Commission, possess "ample legal authority" (Annex 1, p. 2) to provide financial aid. The FEA, relying upon the Comptroller General's May 10, 1976 decision and his February 19, 1976 NRC decision authorized payment of "reasonable and appropriate financial assistance" to consumer representatives -- "to secure that type of consumer representation

in the manner which the Comptroller General determined to be proper" -- in certain of the FEA's proceedings. 42 Federal Register 10891, 10893 (Feb. 24, 1977).

* * *

For the reasons stated herein and in our main brief, the December 8, 1976 Majority Decision of this Court should not be disturbed.

Dated: New York, New York
March 25, 1977

Respectfully submitted,

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Douglas M. Kraus
Of Counsel

ANNEX I

95th Congress
1st Session } COMMITTEE PRINT

AGENCY COMMENTS ON THE PAYMENT OF REASONABLE FEES FOR PUBLIC PARTICIPATION IN AGENCY PROCEEDINGS

PREPARED AT THE REQUEST OF

Hon. WARREN G. MAGNUSON, *Chairman*

COMMITTEE ON COMMERCE

PRINTED FOR THE USE OF THE

COMMITTEE ON COMMERCE

JANUARY 1977

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81-700 WASHINGTON : 1977

LETTER OF TRANSMITTAL

U.S. SENATE,
COMMITTEE ON COMMERCE,
January 24, 1977.

DEAR COLLEAGUE: Provisions have been included in a number of measures which have been considered by the Committee on Commerce to underwrite the expenses of citizens in the regulatory agency decisionmaking process. Both the Regional Rail Reorganization Act of 1973 (Public Law 93–236) and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Public Law 93–637) contain such provisions, and the experience to date indicates that they have significant potential.

Recently, the Comptroller General has determined that many Federal agencies are empowered to adopt a program of payment of public participation expenses under existing authority. The Food and Drug Administration and the Consumer Product Safety Commission have begun the process of issuing regulations for the payment of public participation in the regulatory process.

Implementation of this type of program would respond to the recommendation recently made by the Council for Public Interest Law that "administrative agencies should underwrite the costs of citizen participation in their proceedings to assure that interested citizen groups with limited resources can be heard on matters that affect them." Without this type of assistance, those who are unable to pay the high costs of participating, such as citizen groups and small business, are frequently unable to take part in agency proceedings, to both their disadvantage and to the disadvantage of developing a full agency record prior to taking action.

On December 1, 1976, I wrote to a number of the agencies within the jurisdiction of the Committee on Commerce to determine whether they would embark on such a program without additional legislative authority. The responses of the agencies, together with my letter and the Comptroller General's opinion are contained in this document.

I wish to emphasize that the material contained in this document has neither been approved, disapproved, nor considered by the Senate Committee on Commerce.

WARREN G. MAGNUSON,
Chairman, Committee on Commerce.

CHAIRMAN'S LETTER TO THE AGENCIES [1]

U.S. SENATE,
COMMITTEE ON COMMERCE,
December 1, 1976.

As you know, the Committee on Commerce has been actively engaged in a variety of legislative and oversight activities designed to improve the performance and procedures of the regulatory agencies and commissions.

Of the many disturbing regulatory patterns that have been raised before our committee, perhaps the most conspicuous, persistent and troubling has been the dramatic one-sidedness of the presentations before the agencies. Whether it be a rulemaking proceeding, an adjudicatory hearing, or an informal contact, the process is dominated by well-paid, well-staffed advocates of the interests of the industry being regulated. Moreover, the costs of these presentations are tax-deductible. On the other hand, these agencies rarely hear from representatives of consumer organizations or other nonprofit "public interest" groups, or even from small business interests, due to the severe fiscal constraints under which these groups labor.

The principal result of this gross imbalance in advocacy before the agencies is that regulatory decisions of national importance are often made on the basis of assumptions which go untested, data which go unchallenged, arguments which go unanswered, testimony which is not vigorously cross-examined, and pressures which are not counterbalanced. Under the circumstances, the Congress and the public can have doubts that the regulatory agencies are rendering decisions which are rational, fully informed, in the public interest, and based upon a full and adequate record.

This fundamental defect in the regulatory process should not continue. To that end, I would like to inform you of an action recently taken by the Food and Drug Administration, and similar actions have been proposed by the Consumer Product Safety Commission.

In the Federal Register of August 25, 1976 (41 FR 35855), FDA has solicited public comments on a petition filed with it by Consumers Union, which petition urged FDA to provide by regulation for compensation of reasonable attorneys' fees, expert witness fees, and certain other reasonable costs of participation incurred by eligible participants in certain types of FDA proceedings. The Consumers Union petition, which is reprinted in the Federal Register, contends that most or all Federal agencies are empowered to adopt such a compensation program under their existing statutory authority, and cites legal authority to that effect. This theory has recently been confirmed by the Comptroller General in a May 10, 1976 letter to Congressman John E. Moss, also reprinted in the Federal Register as appendix B.

[1] The letter to the agencies was sent by the chairman to the National Highway Traffic Safety Administration, the Civil Aeronautics Board, Interstate Commerce Commission, Federal Communications Commission, Federal Power Commission, and Federal Maritime Commission.

It would appear, therefore, that there is no longer any doubt that your agency already possesses ample legal authority to do what FDA, at Consumers Union's urging, is evidently preparing to do—begin to remedy the advocacy imbalance which characterizes the regulatory decisionmaking processes of virtually all Federal agencies.

Accordingly, I request that you advise me within 30 days of what specific actions, if any, your agency is taking to insure that nonindustry groups which cannot afford the cost of full participation in your agency's regulatory proceedings are in fact enabled to do so. In the event that you have not taken such actions, I request that you advise me as to the reasons for such inaction.

Very truly yours,

WARREN G. MAGNUSON,
Chairman.

FEDERAL POWER COMMISSION,
Washington, D.C., December 23, 1976.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: This is in response to your letter of December 1, 1976, inquiring as to the specific actions, if any, the Federal Power Commission has taken to insure that nonindustry groups which cannot afford the costs of full participation in the FPC's regulatory proceedings are in fact enabled to do so.

I would like to preface my specific responses to your inquiry by noting that both the Commission and its staff are mindful of our mandate from Congress to protect the public interest. The staff of the Federal Power Commission has respected its legal obligation to provide forthright and vigorous representation of the general public interest before the Commission. In all proceedings, staff seeks to gather a full and complete record on all matters of public interest in the routine prosecution of its case.

Staff's responsibility to insure a complete record has increased in recent years, particularly with respect to environmental issues. See, for example, *Udall* v. *FPC*, 387 U.S. 428 (1967); *Greene County Planning Board* v. *FPC* (I), 455 F. 2d 412 (2d Cir. 1972), *cert. denied*, 499 U.S. 849 (1972). Therefore, it is my opinion, that public and consumer interests are well represented today in Commission proceedings, even in the absence of participation by representatives of special interest groups.

As you are no doubt aware, the Commission has not previously favored the payment of fees to participants in our proceedings. The Commission has opposed legislative proposals which would grant broad authority for such payments. Please refer to the attached FPC report on S. 2715. We note that any present authority to pay such fees, in the view of the Comptroller General, is much more limited than the authority which would have been conveyed by past legislative proposals.

In accordance with the test established by the Comptroller General, the Commission must find: (1) that it cannot make the required determination unless it extends financial assistance to certain interested parties who require it and whose representation is necessary to dispose of the matter before it, and (2) that the party is indigent or otherwise unable to finance its participation. However, the Comptroller General emphasized that this determination is discretionary with each agency. To date, the Commission has not been faced with a request for fees in a case where the participant in a Commission proceeding met both of these criteria. The question as to whether the FPC will use the discretionary authority acknowledged by the Comptroller General must await the determination of the Commission in light of the particular circumstances of a future case.

In this connection, we wish to point out a recent decision by the second circuit on this issue. *Greene County Planning Board, et al.* v.

FPC, Nos. 76–4151 and 76–4153, was remanded by the second circuit on December 8, 1976 for a determination by the FPC on the issue of payment of certain intervenors' litigation expenses. A copy of the slip opinion is attached for your information. The Commission has been granted an enlargement of time so that we may consider the appropriateness of seeking rehearing on this issue.

The Commission has provided financial relief to participants by permitting them to proceed in forma pauperis. The requirements for such relief are set out in the order dated August 28, 1970, 44 Federal Power Commission 655, as follows:

"Any party unable to provide service on the other parties in this proceeding due to financial hardship should file with the Commission, under oath, a letter seeking leave to proceed in forma pauperis and demonstrating that the party is unable to pay such costs. Upon receipt of such letter, the Commission will consider the conditions of financial hardship, and, if the Commission determines that the conditions so warrant, may require the filing of only an original with the Commission. Further, the Commission shall, at its expense, serve all other parties with the filing made by the indigent party. Parties who waive their right to make a written submittal by making an oral presentation are deemed to have served all other parties with copies since the transcript is available to all parties."

By the same order, the Commission set forth the requirements for obtaining a copy of the transcripts by parties unable to purchase one due to financial hardship:

"Parties who desire a copy of the transcripts but are unable to purchase one due to financial hardship should file a letter, under oath, with the Commission seeking leave to proceed in forma pauperis and demonstrating that the party is unable to pay such costs. Upon receipt of such letter, the Commission will consider the conditions of financial hardship, and, if the Commission determines that the conditions so warrant, the requesting party will be provided a copy of each transcript without charge."

It is also the policy of the FPC to assist intervenors by making available all necessary information, including the Commission's technical files and other material. [18 C.F.R. § 2.72 (1976)]. In order to facilitate this policy, the FPC requested, but did not receive, a supplemental appropriation for fiscal year 1976, totalling $2,145,600 for a microfilm center and 22 new staff positions.

The Commission's staff provides legal assistance to intervenors. However, the requirement of separation of functions in the Administrative Procedure Act and the Commission's prohibitions against ex parte communications on substantive matters, 18 Code of Federal Regulations, § 1.4(d) (1976), limits legal assistance by agency staff to procedural matters.

The Commission staff is currently considering further administrative measures to assist intervenors in FPC proceedings. We expect that the results of the study will enable the Commission to recognize the need for implementation of any additional measures.

We are hopeful that these comments will be of assistance to you.

RICHARD L. DUNHAM,
Chairman.

Enclosures.

BARRY H. GARFINKEL
919 THIRD AVENUE
NEW YORK, N.Y. 10022

March 25, 1977

Hon. Daniel A. Fusaro
Clerk
U.S. Court of Appeals for
the Second Circuit
U.S. Courthouse
Foley Square
New York, New York 10007

Re: Greene County Planning Board, et al. v. Federal Power Commission, 76-4153

Dear Mr. Fusaro:

I am herewith enclosing for filing with the en banc Court 25 copies of the Reply Brief for Petitioners Town of Durham.

Sincerely,

Barry H. Garfinkel

Encs.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

GREENE COUNTY PLANNING BOARD, TOWN OF GREENVILLE, TOWN OF DURHAM, NEW YORK and ASSOCIATION FOR THE PRESERVATION OF DURHAM VALLEY,

Petitioners,

-against-

FEDERAL POWER COMMISSION,

Respondent.

POWER AUTHORITY OF THE STATE OF NEW YORK,

Intervenor.

41-4151, 4153

AFFIDAVIT OF SERVICE

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARILYN KOLINSKI, being duly sworn, deposes and says:

I have this day served two copies of the within Reply Brief For Petitioners Town Of Durham And Association For The Preservation Of Durham Valley on the following persons by depositing the same properly enclosed in a post-paid wrapper, in a depository regularly maintained by the United States Postal Service in New York County, New York addressed to their respective addresses:

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Syracuse, New York 13202

Marilyn Kolinski
MARILYN KOLINSKI

Sworn to before me this
25th day of March, 1977.

John Virgil Marinelli

JOHN VIRGIL MARINELLI
Notary Public, State of New York
No. [illegible]
Qualified in Westchester County
Commission Expires March 30, 1977